Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

CHRIS JOHNSON,

Petitioner,

v.

DENNIS K. ROBERTS, INDIVIDUALLY, AND THE BOARD OF COUNTY COMMISSIONERS OF MIAMI COUNTY, AND FRANK KELLY, SHERIFF OF MIAMI COUNTY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Paul Hasty, Jr
Counsel of Record
Lloyd W. Raber
Hasty & Associates, LLC
7101 College Blvd, Suite 350
Overland Park, Kansas 66210
Telephone: (913) 317-8068
phasty@hastyassoc.com
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether a Plaintiff must do more than allege sufficient facts to support a violation of a clearly established constitutional right in order to survive a preliminary motion asserting qualified immunity, from trial and discovery, when the District Court had stayed discovery, including the depositions of the witnesses who provided the majority of the support for the Motion, until the issue of qualified immunity was decided.

2. Whether Plaintiff provided assert and support sufficient facts to meet Plaintiff's burden in opposing a preliminary motion asserting qualified immunity and protection from discovery and trial.

PARTIES TO THE PROCEEDING

The parties to the proceeding are fully identified in the caption of the case. The petitioner is not a corporate entity.

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OPINIONS BELOW

The Opinion of the United States District Court for the District of Kansas (App. pp. 2–15) is reported at 721 F.Supp.2d 1017. The Opinion of the United States Court of Appeals for the Tenth Circuit (App. pp. 16–20) is unpublished, but is available at 2010 WL 5176815. The Order denying rehearing (App. p. 21) is also unpublished.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331, 1343, and 1367. Appeal to the Circuit Court was made pursuant to 28 U.S.C. § 1291. The Judgment of the Circuit Court was entered on December 22, 2010. Rehearing was denied on January 12, 2011. Jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 4:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This case involves an unnecessary and wanton assault on a prisoner in violation of his Eighth Amendment right. A deputy jailer in a small county prison requested a prisoner surrender his property box. After the prisoner surrendered the box, the deputy kicked the property box into the prisoner's leg and used a Taser to repeatedly inflict

great pain on the prisoner to try to force the prisoner to pick up the box that the deputy had kicked into the prisoner's leg.

These details of the incident were recorded by two video sources: (1) the cell camera; and (2) the Taser camera, once the Taser was activated. The Taser camera also recorded the sound of the incident. These videos are available for this Court's review. Petitioner suggests these videos, containing the exact details of the incident, must be viewed before a decision is made.

Petitioner filed an action asserting a violation of his Eight Amendment right. Respondents asserted the defense of qualified immunity and moved to stay discovery pending a determination of qualified immunity. The District Court granted the Motion to Stay Discovery until the issue of qualified immunity could be decided and specifically stayed the depositions for Respondent witnesses. The District Court then granted Defendants' Motion for Summary Judgment on the Issue of Qualified Immunity, which was mostly based on the affidavits of witnesses whose depositions the District Court had stayed. The Court held Mr. Johnson had failed to provide substantial probative evidence of the violation, despite being stayed from discovery. The Tenth Circuit affirmed "for essentially the same reasons."

Plaintiff will demonstrate that the lower courts improperly imposed a heightened standard by requiring Plaintiff to prove his case before discovery, and failed to provide deference to the Plaintiff's version of the facts. Plaintiff will also demonstrate that the lower courts, in erroneously

adopting the Defendants' version of the facts, ignored clear evidence that created a genuine dispute of material fact. This evidence, which included the video recordings of the incident was sufficient to warrant further discovery and was even sufficient to allow a reasonable jury to find a violation of Johnson's rights. Review should be granted because the lower court's holdings stand in opposition to this Court's decisions, and the clear evidence that was obtained through minimal discovery.

A. Factual Background

The assault was recorded by two video sources: (1) the video camera facing the cell (the "G-Cell Video"), and (2) the video camera on the stun gun (the "Taser Video"). The videos provide a genuine dispute regarding whether force was necessary and applied in good faith or whether Officer Robert's inflicted pain on Johnson unnecessarily and wantonly to merely punish Johnson, in violation of Johnson's Eighth Amendment right.

On December 3, 2009, and all relevant times, Plaintiff/Petitioner Chris Johnson was detained at Miami County Jail, in cell "G". Respondent Roberts and Deputy Wesley McClain were both Deputy Jailers at Miami County Jail. At 3:03 Officer Roberts arrived at Mr. Johnson's cell and noticed Johnson's towel hanging lengthwise from the top bunk to dry. (G Cell Video # 2, at 15:03:05). Jail rules prohibit an inmate from obstructing the "view of the camera on any inmate's cell." Respondents state Roberts told Johnson that he would check the cell camera to see if the towel obstructed the view of the cell camera, and that he would cite Johnson

if Roberts found an obstruction. The G-Cell Video demonstrates the video camera's view was obstructed by the locking mechanism, not the towel. (G Cell Video #3, at 15:55:00).

Roberts claims he saw a violation. Officer Roberts, accompanied by Officer McClain, returned to Johnson's cell, at 3:56 p.m. (G Cell Video #3, at 15:56:00). Respondents claim Officer Roberts had returned to provide Johnson a citation for the violation and to confiscate Johnson's property box. Before coming to Johnson's cell, Officer Roberts went to the booking room and removed the jail's Taser (stun-gun) from its locked storage unit. Officer Roberts was not assigned a Taser. The jail Taser was only to be removed by authorization of a supervisor who had analyzed "the perceived risk and threat level."

After McClain opened the cell door, Johnson willingly surrendered his property box by dropping the property box on to the floor in the entrance to the open cell, a few feet from the two jailers. (G Cell Video #3, at 15:57:19–15:57:22). Instead of taking the box, Roberts took two steps forward and deliberately *kicked* the property box back into the cell and toward Johnson, hitting Johnson in the leg. (G Cell Video #3, at 15:57:22–15:57:24). Johnson had fully complied with Roberts order to surrender the box before Roberts used force against Johnson. Any need to remove the box from the cell arose from Officer Roberts' deliberate conduct of kicking the box back into the cell.

After Roberts kicked the box back into the cell, hitting Johnson in the leg, Roberts removed the jail's Taser from his belt and pointed the Taser at

Johnson as Roberts yelled "pick it up," referring to the box that he had just kicked into Johnson's leg. (G Cell Video #3, at 15:57:25; Taser Camera Video[1] #X...4804 at 04). Without waiting for a response, Roberts fired the Taser prongs[2] at Johnson, as Johnson ducked away, yelled "no", and grabbed his mattress for protection. (Taser Camera Videos #X...4804 – X...4805). Johnson deflected the taser prongs with his mattress. (Taser Camera Videos #X...4804 – X...4805).

Roberts then removed the wires from the Taser and discarded the wires and prongs in the front of the cell. (Taser Camera Video #X...4805, at 10). After removing the wires and prongs, Roberts instantly charged at Johnson with the Taser, and drive stunned Johnson in the chest. (Taser Camera Video #X...4805, at 06–12). Having removed the prong cartridge, the Taser was in drive-stun mode.[3] Without the prongs, the Taser did not incapacitate Johnson, but inflicted a painful and concentrated shock. (Taser Camera Videos #X...4805–4814, at 06–19). The Taser video contains the sound of the Taser discharging several times followed by

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[1] The act of drawing the Taser activated the camera on the Taser, which recorded the second video of the assault.

[2] A Taser can either be used in direct contact with a subject, in "drive-stun" mode, or can be used with a cartridge that fires two prongs, which imbed themselves in the subject. The greater the distance between the contact points of the prongs, the greater the chance of incapacitation.

[3] In drive-stun mode a Taser is still able to deliver the same amount of shock to the victim, but is not typically able to incapacitate the individual because the shock is concentrated between the tips of the gun.

Johnson's cries. (Taser Camera Videos #X...4805–4849, at 13–55).

Respondents claim that Roberts entered the cell to retrieve the mattress because Roberts had to remove the taser prongs, he had fired at Johnson, from the mattress. Officer Roberts had entered Johnson's cell and had shocked Johnson in the chest before requesting the mattress, before explaining his need for the mattress, and before even attempting to grab the mattress. (Taser Camera Video #X...4805, at 06 – 12; G Cell Video #3, at 15:57:34 – 15:57:39).

After drive stunning Johnson in the chest, Roberts then shoved Johnson into the metal bunk and continued to shock Johnson with the Taser several times while Johnson merely attempted to hide behind his mattress; Johnson did not take any physical retaliatory action. (G Cell Video #3, at 15:57:38 – 15:57:43; Taser Camera Video #X...4813–4814, at 13 – 23). Roberts still did not request the mattress.

Roberts continued to repeatedly shock Johnson for about ten seconds before finally requesting the mattress for the first time, yelling: "Give me that!", while he continued to shock, and otherwise assault, Johnson. (Taser Camera Video #X...4813, at 23 – 24). When Johnson continued to shield himself with the mattress, Roberts again yelled "give me that," drive stunned Johnson several more times, and stripped the mattress from Johnson. (Taser Camera Videos #X...4824, X...4826, at 24 – 31; G Cell Video #3, at 15:57:47 – 15:57:55).

Officer McClain removed the mattress and property box from the cell. (G Cell Video #3

15:57:55 – 15:57:57). While the mattress and property box had been removed from the cell, Roberts continued to use the Taser on Johnson to inflict immense pain. (G Cell Video #3 15:57:55 – 15:57:57). Roberts' purported goals had been achieved, but Roberts continued to inflict immense pain on Johnson. (G Cell Video #3 15:57:55 – 15:58:16; Taser Camera Video X...4826, at 33 – 34; Taser Camera Video X...4834, at 38 – 43).

Much of this portion of the Taser video, from seconds 43–49, has not been produced by Respondents, and Johnson has been stayed from discovery. This was the most brutal portion of the attack, in which Roberts shocked Johnson with the Taser about ten times, even though the box and mattress had been removed. Roberts continued to tase and otherwise assault Johnson for another twenty seconds after Roberts took the mattress and property box from Johnson. (G Cell Video #3 15:57:55 – 15:58:16).

Roberts and McClain left Johnson's cell and returned one minute later to clean some debris from the floor of Johnson's cell. (G Cell Video #3, at 16:00:40). McClain opened the cell door, and watched Roberts kneel at the entrance of the cell and sweep up some debris from the floor. (G Cell Video #3, at 16:01:10 – 16:01:13). Neither Roberts nor McClain watched Johnson as Roberts knelt in the open entrance to the Johnson's cell. (G Cell Video #3, at 16:01:10 – 16:01:35).

Prior to the assault, Roberts had been through Taser training and understood that a Taser, whether used with or without the prongs, causes great pain to the victim and can cause great injury

or death, (Roberts had chosen not to experience the pain and risks, listed in a liability release form, by declining to participate in voluntary tasing). Roberts also understood that a Taser is designed to incapacitate the subject when used with the prongs and wires, but typically does not incapacitate the subject when used in drive-stun mode, (in direct contact with the subject and without the use of the prongs and wires).

Defendant Sheriff Kelly endorsed Roberts' actions as the correct actions in the given circumstance.

B. Procedural Background

On December 23, 2009, Plaintiff/Petitioner, Chris Johnson, filed a complaint in the United States District Court for the District of Kansas against the Defendants/Respondents. The Complaint was amended on March 5, 2009. Mr. Johnson's claims arise under 42 U.S.C. § 1983 and under state law.

Johnson claims that his Eighth Amendments right was violated by Respondents due to cruel and unusual punishment. Johnson claims that Officer Roberts unnecessarily and wantonly used force against Johnson when Officer Roberts kicked a property box at Johnson and used a Taser to repeatedly shock Johnson and inflict great pain on Johnson in a purported attempt to force Johnson to pick up the box Roberts had kicked into Johnson's cell. Plaintiff claims that such force, endorsed by the Sherriff, was unnecessary and wanton in violation of Plaintiff's Eighth Amendment right against cruel and unusual punishment.

Respondents produced a small amount of discovery, including two video-recordings of the incident from two different sources: (1) the video recorded by the cell's camera, and (2) the video recorded by the Taser. Respondents then asserted immunity from discovery and filed a preliminary Motion for Summary Judgment based on the doctrine of qualified immunity. Respondents attached the videos of the attack and three affidavits of the witnesses whom Plaintiff was unable to depose because Defendants had sought and received a stay of discovery.

Defendants asserted forty-two facts in their Motion. Only eleven of the forty-two facts referenced at least one of the two videos; the other thirty-one facts were exclusively based on the opinions taken from the affidavits of these unavailable witnesses. Johnson had scheduled depositions of these witnesses used by Respondents in their Motion, but the Court specifically stayed the depositions until the preliminary issue of qualified immunity was resolved. (App. at 22–27). In its order staying discovery, the District Court cited *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and found that qualified immunity was a preliminary issue that should be resolved before allowing discovery. (App. at 25).

In Johnson's Response to the Motion for Summary Judgment, and in his appeal, Johnson reminded the lower courts that discovery had been stayed, that the District Court had decided to determine the issue of qualified immunity without further discovery, and that the District Court had

specifically stayed the depositions of the witnesses who provided the exclusive support for almost all of the statements of fact provided by the Defendants. Johnson argued that such affidavits of these witnesses, whom the District Court had made unavailable, were improper and irrelevant to the issue of whether Johnson had asserted sufficient facts to support a violation of a clearly established constitutional right and was, thus, entitled to further discovery.

Johnson not only argued that his allegations were sufficient to warrant further discovery, but demonstrated that the Defendants had not eliminated every genuine dispute and had not met their summary judgment burden of demonstrating they were undisputedly entitled to qualified immunity. Johnson then used the limited discovery and his own affidavit to demonstrate summary judgment was not appropriate.

The Court ignored Plaintiff's asserted facts, and the support thereof, and adopted the Defendants' version of the facts, the majority of which were only supported by the affidavits of the witnesses the Court had specifically protected from discovery. The Court ultimately found that Johnson had failed to provide sufficient facts to support his assertions, despite being stayed from discovery, stating: "[T]he opposing party may not rely upon mere allegations or denials . . . [but] must come forward with specific facts . . . and significant probative evidence supporting the allegation." (App. at 3).

On appeal, in addition to providing another lengthy analysis of the factual support for his assertions, Johnson again asserted that the

preliminary issue of qualified immunity, performed before discovery, merely involves an inquiry of the sufficiency of the plaintiff's allegations, and that a plaintiff cannot be barred from discovery and expected to come forward with substantial probative evidence to support the allegations, and that it was Defendants' burden to demonstrate they were undisputedly entitled to qualified immunity. Again, Johnson used the two videos of the assault to demonstrate the existence of a genuine factual dispute regarding Officer Roberts' intentions in assaulting Johnson. The Tenth Circuit ignored the factual support and merely agreed with the District Court, stating: "Mr. Johnson could not rely on his mere allegations to defeat [the] summary judgment motion." (App. at 19).

Johnson submitted a petition requesting the Court reconsider the judgment which Johnson believed to prematurely place a nearly impossible burden on a litigant who must defend an assertion of qualified immunity with little or no discovery. The Circuit Court denied Johnson's petition for rehearing. (App. at 21). Johnson petitions this court for review of the lower court's decisions.

ARGUMENTS

The Tenth Circuit has placed an improper and nearly impossible heightened burden upon a plaintiff who makes a claim under 42 U.S.C. § 1983. The District Court decided it was proper to consider the issue of qualified immunity before discovery and barred the depositions of all the witnesses whom Defendants used as exclusive support to all but a few of Defendants' alleged facts. After staying the depositions and discovery, the

District Court found Plaintiff had failed to provide "significant probative evidence" of the alleged violation of his constitutional rights. The Tenth Circuit upheld the District Courts decision stating: "Mr. Johnson could not rely on his mere allegations to defeat Defendants' summary-judgment motion." The lower courts erred in ignoring Defendants' burden, placing an improper heightened burden on Plaintiff, ignoring the undisputed evidence, and, instead of deferring to Plaintiff's version of the facts, improperly adopting the Defendants' affidavits of witnesses whom the court had specifically prevented the Plaintiff from deposing.

The opinion of the lower courts stand in opposition to the established laws of this Court and places an improper burden on the plaintiff to prove his case in order overcome a preliminary assertion of qualified immunity and be allowed discovery. In addition to improperly strengthening the defense of qualified immunity, the lower courts ignored the clear undisputed facts, failed to provide deference to the Plaintiff's asserted facts, improperly adopted the Defendants' version of the facts, and improperly placed the burden on the Plaintiff, instead of Defendants, to demonstrate undisputed facts. Defendant bore the burden of demonstrating the absence of dispute regarding Defendants' claim of qualified immunity, and of demonstrating Defendants were entitled to the defense.

A. THIS CASE INVOLVES THE REVIEW OF IMPORTANT CONSTITUTIONAL RIGHTS AND THE ABILITY TO ENFORCE THOSE RIGHTS

While there is an interest in reducing baseless claims at an early stage in litigation, such interest

cannot be allowed to eliminate or impede the ability of individuals to enforce a clear constitutional right that has been violated by a government official. The interest in upholding our constitutional guarantees must take precedent.

This "balance between evils" was recognized by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 813–14, 102 S.Ct. 2727 (1982), and various subsequent decisions. The *Harlow* Court recognized that when constitutional rights are violated by government officials "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Id.* at 814. These actions for damages are not only important in providing an avenue for vindication, but are also crucial in deterring future conduct that an official knows, or should know, violates such rights.

In regards to this important aspect of Section 1983 litigation, this Court declared: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate." *Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806 (1985) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S.Ct. 2727 (1982)). Though qualified immunity offers *limited* protection to officials in order to encourage performance of public duties, a public official cannot be allowed to act in a manner that the official should know violates an individual's constitutional right. An official must be made to hesitate where his conduct would violate a clearly established constitutional right. In such situations an official's actions must be questioned; this is the

point of this type of action and the reason the immunity is *limited*.

This is a delicate balance between preventing superfluous claims against government officials and ensuring our citizens have an avenue for vindication of our constitutional guarantees. For this reason, the issue of qualified immunity has been before this Court many times, and warrants further clarification in order to prevent the erosion of, what is for many people, "the only realistic avenue for vindication of constitutional guarantees."

This case involves a situation in which the District Court stayed the depositions of certain witnesses and then used their testimony to grant summary judgment. In this case, the lower courts ignored the Plaintiff's assertions, and the clear evidence in support of such assertions, and departed from this Court's precedent to place an unwarranted burden on a litigant asserting a violation of his constitutional rights. The decisions of District Court and the Tenth Circuit must be overturned. Judicial economy is not an important enough interest to place a nearly impossible burden upon a litigant merely to obtain discovery.

B. THE HOLDING OF THE LOWER COURTS OPPOSES THIS COURT'S PRECEDENT BY PLACING AN IMPROPER BURDEN ON A LITIGANT SEEKING VINDICATION OF A CONSTITUTIONAL GUARANTEE

The holding of the lower courts allows an official to escape the scrutiny of a Section 1983 action before discovery, as long as the official provides an affidavit stating he did not violate the plaintiff's

rights. The lower courts hold that such affidavit should be adopted regardless of the facts alleged by the plaintiff, the actual factual support for the plaintiff's allegations, or the availability of the affiant. This holding stands in direct opposition to the precedent set by this Court and expands qualified immunity into an almost full immunity. This holding greatly hinders the ability of a citizen to enforce his rights and our ability to ensure officials hesitates before violating such rights. This Petition should be granted in order to halt the degeneration of our ability to enforce our constitutional guarantees. This Court should reverse the lower courts' heightened requirements.

i. Qualified Immunity is a Threshold Question of Whether the Plaintiff Has Asserted Sufficient Facts to Support a Violation of a Clearly Established Constitutional Right

The holding of the lower courts improperly shifts the defendant's burden to the plaintiff, and requires the plaintiff in a Section 1983 action to provide significant probative evidence, before discovery, in order to be allowed discovery. The lower courts' holding is contrary to the precedent of this Court.

This Court considers qualified immunity to be a "threshold question", and has stated: "Until this threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818. This Court also stated: "Unless the plaintiff's *allegations* state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal *before the commencement of discovery*." *Mitchell*, 472 U.S. at

526, (emphasis added), (citing *Harlow*, 457 U.S. at 818). Qualified immunity is a threshold question that can and should be resolved before discovery.

In this case, the District Court followed *Harlow* and decided to stay discovery until the issue of qualified immunity was resolved. *Harlow* and *Mitchell* demonstrate that it is proper to determine the issue of qualified immunity before discovery. However, because *Harlow* and *Mitchell* are correct in holding that qualified immunity should be decided before discovery, the pure issue of qualified immunity cannot involve more than an analysis of the sufficiency of plaintiff's allegations.

This Court established this two prong test for the lower courts to follow when determining the threshold question of qualified immunity, stating: (1) "Taken in the light most favorable to the party asserting the injury, *do the facts alleged* show the officer's conduct violated a constitutional right?"; and (2) was the right "clearly established?" *Saucier v. Katz*, 533 U.S. 194, 201,121 S.Ct. 2151 (2001), (emphasis added), (overruled, only regarding the order of the two part inquiry, by *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 815–16 (2009)). While *Pearson* determined that the order of the inquiry is irrelevant, it upheld the two elements that must be demonstrated for a plaintiff to survive the threshold issue of qualified immunity. *Pearson*, 129 S.Ct. at 815–16. The inquiry currently remains the same: whether the "facts alleged show the officer's conduct violated a [clearly established] constitutional right." The threshold issue of qualified immunity involves an examination of whether the plaintiff has *alleged*

sufficient facts to warrant discovery. To survive a preliminary assertion of qualified immunity from discovery, the plaintiff must demonstrate his alleged facts support an allegation of a clearly established constitutional right.

In *Crawford-El v. Britton*, this Court this Court again recognized the issue of qualified immunity, if plead, should be resolved before discovery, and stated: "To do so, the court must determine whether, *assuming the truth of the plaintiff's allegations*, the official's conduct violated clearly established law." 523 U.S. 574, 598, 118 S.Ct. 1584, 1597, 140 L.Ed.2d 759 (1998), (emphasis added). Because pleadings sometimes do not contain sufficient facts to make such a finding, this Court then recognized that the trial court, in such situation, "may insist that the plaintiff 'put forward specific, nonconclusory factual *allegations*' that establish improper motive." *Id.*, (emphasis added), (*quoting Siegert v. Gilley*, 500 U.S. 226, 236, 111 S.Ct. 1789, 1795, 114 L.Ed.2d 277 (1991), (Kennedy Concurring). It is improper, however, for the court in such determination, as was in this case, to insist more; the Court cannot insist the plaintiff prove those allegations before being allowed discovery.

The issue of qualified immunity can and should be determined before discovery because qualified immunity, when examined alone, only asks whether the "facts alleged" by plaintiff constitute a violation of a clearly established constitutional right. The District Court was correct in determining the issue before discovery. In doing so, the District Court could have insisted Plaintiff put forth more specific allegation. However, the

District Court could not insist Plaintiff prove his allegations before being allowed discovery. Such action is clearly contrary to the established law of this Court. Furthermore, it is the Defendant, as the proponent of summary judgment, who bears the burden of coming forward with sufficient evidence.

ii. Defendants, As Movants, Bear the Burden of Establishing An Undisputed Right to Qualified Immunity

When examining the sole issue of qualified immunity, the plaintiff's version of the facts should be adopted unless it is clearly contradicted by undisputed evidence. *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769 (2007). "'The Defendant bears the normal summary judgment burden of showing no material facts that would defeat the qualified immunity defense remain in dispute.'" *Farmer v. Perrill*, 288 F.3d 1254, 1259 (10th Cir. 2002), (quoting *Foote v. Spiegel*, 118 F. 3d 1416, 1424 (10th Cir., 1997")).

If the plaintiff demonstrates the allegations are sufficient, the burden does not remain with the plaintiff to then prove his case to survive the defense of qualified immunity. If the allegations sufficiently state a violation of a clear constitutional right, the defendant is only entitled to qualified immunity if the defendant demonstrates there is no genuine issue of material fact and that the defendant is entitled to qualified immunity as a matter of law; the production of sufficient evidence is the defendant's burden, not the plaintiffs. If a defendant cannot demonstrate undisputed evidence contradicting the plaintiff's

assertions, than a finding of qualified immunity is improper at that point.

The lower courts erred by placing this burden on Plaintiff and not on Defendants. The lower courts erred in granting immunity to Defendants, without holding defendants to the burden of providing substantial probative evidence clearly contradicting Plaintiff's assertions. The Court further erred by ignoring the factual support of Plaintiff's assertions and adopting Defendant's version of the facts.

iii. The Lower Courts Improperly Held Plaintiff to a Heightened Burden and Improperly Adopted Defendants' Facts

In this case, soon after discovery had begun, Defendants moved for a protective order asserting qualified immunity, and filed its Motion for summary judgment and Defendants' Suggestions in Support of their Motion for Summary Judgment on the Basis of Qualified Immunity. The Court stayed discovery pending the Motion based on qualified immunity. Defendants attached the two videos to Defendant's Motion, and three affidavits of protected witnesses. Defendant asserted forty-two facts. All but eleven of the forty-two facts were exclusively based on the affidavits of witnesses unavailable to Plaintiff.

While the District Court correctly decided to determine the issue of qualified immunity before allowing further discovery, the Court erred in considering the affidavits of protected witnesses to determine the exclusive threshold question of whether Plaintiff asserted a violation of a clearly established constitutional right. In this case discovery had barely begun. The Court specifically

decided to hear the issue of qualified immunity *before* allowing Plaintiff to take any depositions of the affiants or make any further discovery; yet the District Court still considered the testimony of the witnesses over Plaintiff's objections.

Plaintiff, in his Response to Defendants' Motion asserting qualified immunity, specifically reminded the Court that Defendant was asserting immunity from suit *and discovery*, and that the Court had decided to hear the issue before allowing any deposition or any further discovery. Plaintiff argued affidavits of the protected witnesses were improper and irrelevant in determining the threshold question of qualified immunity, which examined whether Plaintiff's allegation supported a violation of a clearly established constitutional right, not whether the Plaintiff could prove his claim before being allowed further discovery.

While Defendants failed to contradict Plaintiff's assertions with clear undisputed evidence, the District Court improperly adopted the Defendants version of the facts instead of deferring to Plaintiff's alleged facts. One example of this improper deference to the Defendants' facts relates to the dispute over whether Roberts shocked Johnson. While both sides presented evidence regarding the dispute, the Court adopted the Defendants' version of the facts. While Roberts' affidavit stated the Taser malfunctioned, Johnson had stated, in his affidavit, that he was shocked over ten times. Furthermore, Johnson cited the Taser video that contains the clear sound of electricity being discharged into Johnson as the Taser made contact with Johnson, while Johnson cried out in pain.

While the video provides sufficient, if not conclusive, evidence that Johnson was shocked multiple times, the Court, adopted the Defendants' version of the facts, supported only by Roberts' affidavit.

The Court not only ignored Plaintiff's allegations, but also ignored the clear factual support for the allegations. The District Court, instead, adopted the opinions expressed in the affidavits of the witnesses whom the District Court had made unavailable to the Plaintiff. In ignoring Plaintiff's supported facts, the District Court held Plaintiff had failed to provide substantial probative evidence to withstand Defendants' Motion asserting qualified immunity. The lower courts erred in placing the Defendants' burden upon the Plaintiff and by adopting the statements of the undiscoverable affiants over Plaintiff's asserted facts, and the clear evidence that had actually been discovered.

Not only did the court error in considering the affidavits of unavailable witness, when it should have merely been deciding whether the factual allegations were sufficient, the court placed an improper burden on Plaintiff to prove his assertions before discovery, even though Defendants had not met their burden of proven Defendants were undisputedly entitled to qualified immunity. A plaintiff's asserted facts must be adopted unless clearly contradicted by undisputed evidence from the defendant. The District Court erroneously adopted Defendants statements, and found that Plaintiff had not produced sufficient evidence to defeat the Defendant's asserted facts. The

Appellate Court "affirm[ed] for essentially the same reasons stated in that opinion."

The holding of the lower courts is in opposition to the clear precedent of this Court. The lower courts have set an undue burden upon litigants attempting to enforce their constitutional guaranties. This is not the Plaintiff's burden when faced with a motion asserting qualified immunity. As recognized by this Court in *Mitchell*, qualified immunity involves an inquiry into the sufficiency of the plaintiff's allegations, not whether plaintiff has sufficiently proved those facts. The District Court decision, as upheld by the Circuit Court, stands in clear opposition to the clearly established law of this Court and places an unwarranted burden upon those individuals seeking vindication for a violation of their constitutional rights.

A defendant cannot be allowed to receive the protection of qualified immunity before sufficient discovery is allowed simply by submitting an affidavit of a protected witness. In this case, the lower courts' misapplication of the doctrine of qualified immunity resulted in a substantially supported claim being denied discovery. Review is warranted to correct this great injustice and prevent the proliferation of such injustice.

C. THE ALLEGED AND SUPPORTED FACTS WARRANTED FURTHER DISCOVERY

In addition to deciding the case inconsistent to the clearly established laws of this Court, the District Court and Tenth Circuit committed manifest injustice by ignoring the clear facts of this case, most of which were recorded by two video sources. The clear facts in this case created a

genuine dispute of material fact. The facts warranted further discovery and, although discovery had barely begun when the Court decided to determine the issue of qualified immunity, Plaintiff had submitted sufficient facts to warrant a determination by a jury.

Summary judgment is only appropriate if "discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Mitchell*, 472 U.S. at 526. In this case, only minimal discovery had been allowed before the District Court decided to stay the depositions of Defendants' witnesses and all further discovery until it decided the issue of qualified immunity. Because the District Court had decided to determine the issue, before allowing further discovery, the Court should have limited its determination to the allegations and the discovery that had been allowed. However, in this case, the minimal discovery that had been allowed clearly "creat[ed] a genuine issue as to whether the defendant in fact committed those acts."

Even taking into consideration the affidavits of the unavailable witnesses, there was a genuine issue of material fact; Defendants had failed their burden. By merely viewing the two videos, a jury could determine that Officer Roberts kicked Johnson's property box at him and used the Taser on Johnson merely to punish Johnson for his attitude in surrendering his property box and rightfully refusing to sign the citation. The videos demonstrate that *if* any force was needed, such need was completely caused by Officer Roberts' own deliberate actions. With such clear evidence,

presented in length in Plaintiff's Response and Appeal, it is hard to see how the Tenth Circuit found Plaintiff was merely attempting to rely on his mere allegations. While Plaintiff believes the clear precedent of this Court demonstrates a preliminary examination of qualified immunity only involves the sufficiency of the allegations, Plaintiff has demonstrated, and again will demonstrate, there are clear questions regarding Roberts' use of force against Johnson.

A right is clearly established if "a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987). "'[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" *Hudson v. McMillian*, 503 U.S. 1, 5, 112 S.Ct. 995 (1992), (quoting *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed. 2d. 251 (1986)). The use of force involves a balance between (1) "the threat the unrest poses to inmates, prison workers, administrators and visitors [and (2)] the harm inmates may suffer if guards use force." *Id.*, at 6. It is clearly established that the unnecessary and wanton infliction of pain is a violation of the Eighth Amendment, and that force should only be used where there is a reasonably perceived threat. It is clearly established that inflicting pain on a prisoner to merely punish the prisoner is torture, which is forbidden by the Eighth Amendment. *Id.* at 9.

A prison official cannot harm an inmate merely to punish the inmate for something the inmate did.

A reasonable officer would be fully aware that causing pain to a prisoner violates his rights if such pain was merely inflicted as a punishment or out of anger toward that prisoner. A review of the two videos demonstrates a genuine issue regarding whether such force was used merely to punish Johnson.

It is also clearly established that force is excessive if the need for force is created by the officer's own deliberate or reckless conduct. *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir., 2001). In this case, *if* force was necessary, it was only necessary after Roberts kicked the property box at Johnson. Any force that could possibly be considered necessary was created by Roberts, and therefore excessive. This is probably the most important fact that the lower courts ignored.

The lower courts, in misinterpreting Plaintiff's burden, had deferred to the Defendant's version of facts and ignored the Plaintiff's supported facts. Contrary to the clear evidence, and without any other support than the officers' affidavits, the District Court found Johnson had thrown the box *at* Roberts and hit Roberts in the foot. The District Court then entirely ignored the fact that Roberts *kicked* the box back into the cell, hitting Johnson in the leg., which, alone, is a violation of Johnson's rights.

Roberts came to the cell to give Johnson a citation for a claimed violation of a jail rule and to remove Johnson's property box as a punishment for the purported violation. Johnson rightfully refused to sign the citation; and then willingly surrendered his property box by dropping the box on the floor in

the entrance of the cell. The G-Cell video showed Johnson dropped the box while the officers watched it drop a few feet in front of them. Johnson also submitted an affidavit stating the same. Furthermore, the gaze of the officers demonstrates the box came to a rest a few feet from Roberts, who had to take a few steps toward the box to kick it at Johnson. Roberts immediately, without hesitation, kicked the box back into the cell, and into Johnson's leg. These facts are clearly contained in the G-Cell Video and in Johnson's affidavit. The Court erred in adopting the Defendants' facts when such facts were clearly controverted and even disproven.

The Court had completely ignored the fact that Roberts kicked the box at Johnson, hitting him in the leg. The Court also ignored the fact that Roberts did not order Johnson to pick the box up until after Roberts had kicked it back into the cell. The act of kicking the property box at Johnson was a deliberate act by Roberts and a clear contradiction to Roberts' goal of confiscating the box from Johnson. All subsequent actions stemmed from Roberts' deliberate act of kicking the box back into the cell. Because all subsequent actions were taken as a result of Roberts' deliberate act of kicking the box into the cell, all subsequent force was excessive; an officer cannot deliberately create a need for force and expect such conduct to be put beyond judicial review. By ignoring Roberts' deliberate conduct and adopting his excuses over the clear evidence, this is exactly what the District Court did; it put Roberts' deliberate conduct beyond review.

After ignoring these facts, the District Court wrote off the rest of Plaintiff's facts and stated that such facts merely consisted of second guessing the official. However, these facts do not merely show a different way Roberts could have handled the situation. These facts provide clear evidence that Roberts was not acting in good faith, and demonstrate Roberts hastily resulted to counterproductive force without even pausing to think of an alternative.

Hudson makes it clear that the need for force, the relationship between the need and the amount of force used, and the reasonableness of the perceived threat are highly relevant to determine whether the force violated the Eighth Amendment. *Hudson*, 503 U.S. at 6, (quoting *Whitley*, 475 U.S. at 321). In *Lewis v. Downey*, 581 F.3d 467 (7th Cir. 2009), (Cert. denied, 581 F.3d 467), the Seventh Circuit, in hearing an appeal of a motion for summary judgment asserting qualified immunity, analyze a similar fact set. The Court found that several of the facts, as asserted by the plaintiff, were "troubling: the absence of an agitation or threat from [the prisoner]; the short passage of time between [the officer's] order and the taser shot; [the officer's] single, unrepeated order, and the dearth of warnings regarding the consequences of [the prisoner's] failure to comply." *Id.* at 478. These "troubling" facts, as asserted by the plaintiff, were sufficient to survive the assertion of qualified immunity and sufficient to be submitted to a jury. *Id.*

In this case, Johnson has also alleged and demonstrated similar "troubling" facts. This case

involves hasty decisions to take violent action without any threat of force, with little or no warning, and without making any attempt at a nonviolent remedy.

While Roberts' objective was to remove the box and cite Johnson, Johnson had surrendered his box. The box was obviously in reach of Roberts' foot. Roberts could have easily used his foot to take the box out of the cell, but he, instead, used his foot to kick the box at Johnson. The need for force was even less if the box did hit Roberts in the foot, as asserted by the Defendant and believed by the lower court; the box would have been far outside the cell and any further action would have been merely retaliatory and unnecessary. Either way, the objective of removing the box from the cell had either been completed or could have easily been completed without any force. No reasonable officer can believe that it is necessary to kick a property box at the prisoner, and back into the cell, when trying to remove the box from the entrance of the cell.

The facts asserted, and supported, by Plaintiff do not merely demonstrate an alternative action. The facts, as revealed by the videos, demonstrate that Roberts was not interested in the asserted objective of removing the box. The facts show Roberts unnecessarily and wantonly inflicted pain on Johnson as punishment, merely because Johnson surrendered by box by dropping it on the floor. Roberts was merely upset with Johnson's attitude and wanted to assert his authority by causing pain to Johnson, and to teach Johnson a lesson. There was absolutely no need to kick the

box at Johnson. Such action was counterproductive, unnecessary and clearly wanton. Any reasonable jury could find that Roberts was acting unnecessarily and wantonly.

Roberts' subsequent actions, in addition to being a mere continuation of Roberts' deliberate act, were also unnecessary, wanton, and counterproductive to Defendants' proffered excuses. After kicking the box into Johnson's leg, Roberts withdrew a Taser, which he had taken from storage for the specific occasion, and fired the Taser at Johnson. Again, Roberts hastily resulted to unnecessary and counterproductive force absent threat or agitation, with a singular, unrepeated and quick warning, without pause and without warning regarding consequence.

Defendants asserted that force was necessary to make Johnson pick up the box that Roberts had kicked back into Johnson's cell. However, Roberts knew that a Taser usually incapacitates the target when used with the prongs, and not in drive stun mode. *If* it really was necessary to force Johnson to pick up the box, incapacitating him would have been counterproductive to the objective. This is not a situation like *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988), or *Soto v. Dickey*, 744 F.2d 1260 (7th Cir. 1984), where incapacitation was necessary in a high security prison to perform a strip search or move a dangerous prisoner. In this case, incapacitation would have actually been counterproductive; an incapacitated person cannot pick up a box. Again, the action does not match the objective, providing further evidence of malicious intent, and, thus, created another troubling issue of

disputed fact, especially when considering Roberts had kicked the box into the cell, and Roberts had fired the Taser hastily without any reasonably perceived threat and without attempting any nonviolent action.

The Defendants' then claim it was necessary for Roberts to enter the cell and repeatedly shock Johnson with the Taser because Roberts needed to retrieve the mattress. Defendants assert Roberts needed to retrieve the mattress because the Taser prongs had become embedded in the mattress. Again, if there was a need to retrieve the mattress, such need merely stemmed from the deliberate actions of Roberts.

This situation involves pure corporal punishment. This case merely involves a deputy jailer's desire to flex his power, in a small county prison, to teach a prisoner respect by inflicting great pain on the prisoner. This case is no different than if a police officer had beaten an individual for tossing his driver's license out the window, instead of handing it to the officer, and then continuing to beat the individual until the individual retrieved his license from the ground. Any reasonable officer should know it is a violation of a prisoner's rights to kick an object into a prisoner and then use a Taser to send painful electric charges into the prisoner until he picked it up. Any reasonable jury could find such actions did, in fact, violate the prisoner's rights.

The video, again, does not match the Defendants' proffered excuses. After failing shoot Johnson with the Taser prongs, Officer Roberts immediately removed the prong cartage, charged at

Johnson, and drive stunned Johnson in the chest. Roberts knew that by removing the prongs, which he left them in the front of the cell, the Taser would only be useful to inflict great pain without incapacitation and would be no different than physically hitting Johnson with the Taser. The video shows that Roberts drive stunned Johnson in the chest before requesting the mattress, grabbing the mattress or making any nonviolent attempt to remove the mattress. Roberts did not request the mattress until ten seconds after drive stunning Johnson. Roberts was not interested in retrieving the mattress. The video creates a genuine dispute regarding this issue.

Roberts was merely following through in his attempt to inflict great pain on Johnson with the Taser, which Roberts had taken from storage for this specific occasion. The facts show the only reason Roberts told Johnson to give him the mattress, ten seconds after initially drive stunning Johnson, was because the mattress was hindering his ability to tase Johnson. There is clear evidence of malicious intent in this specific act of charging into the cell and repeatedly drive stunning Johnson. It is also important to remember that this specific act was a mere continuation of Roberts' prior actions and ill motive. These actions all stemmed from Roberts' deliberate act of kicking the box at Johnson.

Once the mattress was removed and the box was removed, there was absolutely no reason or excuse to continue the assault. All Defendants' proffered objectives had been completed. Even if the box and mattress needed to be removed, the box

and mattress had been taken into the officers' control. However, the assault continued without reason and increased in intensity.

Defendants provided no explanation for the continued assault. Roberts had come to confiscate Johnson's property box. That was done. Whether or not the mattress had needed to be removed, Roberts had also removed the mattress. There was absolutely no further need to shock Johnson and no further excuses offered by Defendants. However, Roberts continued to inflict great pain on Johnson by shocking Johnson with the Taser. Roberts did not stop shocking Johnson until twenty seconds after the officers had removed the box and mattress from the cell.

Though Defendants did not produce a portion of the Taser video that had captured six seconds of this portion of the assault, from 21:48:43–21:48:49, Johnson stated in his affidavit[4] that during this period, after the mattress and box had been removed, Roberts used the Taser on him in an excess of ten times. This portion of the attack was one of the more brutal portions of the attack, although the mattress and property box had been removed from the cell. However, Defendants failed their summary judgment burden, of showing they were undisputedly entitled to qualified immunity, by failing to provide any explanation for the continuation of the assault. Defendants have not provided an explanation for either bookend of the assault. The lower courts, however, ignored these

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[4] This is the only portion supported only by Johnson's affidavit, but, like the majority of the facts, was, again, only opposed by Defendants' affidavits.

facts, and improperly place the burden on Plaintiff to prove the violation of his rights before being allowed discovery.

The facts demonstrate further discovery was warranted. All force was unnecessary in this situation. Roberts began the assault by kicking the property box into Johnson's leg; a box Roberts was supposedly trying to remove from the cell. If any force was necessary, it was only necessary as a result of Roberts' deliberate action of kicking the box back into the cell. Each subsequent use of force against Johnson was unnecessary and wanton, especially the final portion of the assault.

The evidence clearly demonstrates that Roberts was merely trying to punish Johnson for Johnson's attitude. Roberts wanted to use pain to refine Johnson and to assert his authority over Johnson. The use of force against Johnson, especially when examined as a whole, could make a reasonable jury believe Roberts unnecessarily and wantonly inflicted pain on Johnson. The bookends of the assault were clearly unnecessary and wanton, and a reasonable jury could find the other portions were also unnecessary and wanton. Furthermore, the entire assault was excessive as a matter of law, because any force that could be considered necessary was only made necessary by Roberts' own deliberate conduct of kicking the property box back into the cell.

CONCLUSION

The lower courts ruled against the clear president of this Court by establishing a heightened standard to resist a preliminary assertion of qualified immunity. The lower courts

also ruled against the clear evidence that had actually been discovered before the stay was imposed. While Defendants failed to fulfill their burden, Plaintiff not only asserted sufficient facts, Plaintiff also supported his assertion with substantial probative evidence. This evidence was not only sufficient to survive summary judgment, but may have also warranted summary judgment for Plaintiff on the issue of excessive force, if Plaintiff had so moved.

Defendants failed their burden. Defendants do not explain how a reasonable officer could have believed it was necessary to kick the property box at Johnson and then use a Taser to repeatedly shock Johnson to force Johnson to pick up the box. Defendants merely assert that corporal punishment is necessary to maintain discipline in the prison system. Defendants, in their Motion asserted that force "must be used" to maintain order and discipline and officers cannot be second guessed when using such force. The District Court agreed, believing officers cannot be second guessed, and the Circuit Court merely concurred. However, the whole purpose of this type of action is to ensure officers hesitate before violating a clear constitutional right. In cases such as this one, with so many troubling facts, the officers must be second guessed; qualified immunity is not full immunity.

One of the purposes of the Eighth Amendment is to ensure prisoners are not subject to cruel and unusual punishment, including unnecessary and wanton infliction of pain. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 1977 (U.S.,1994). *Brennan* recognizes: "Being violently assaulted in

prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Id.* (quoting *Rhodes v. Chapman,* 452 U.S. 337, 347, 101 S.Ct. 2392, 2399 (1981). Officials cannot be given free reign to punish prisoners with pain whenever the prisoner acts disrespectfully. Officials cannot be given free reign to even inflict pain every time a prisoner violates a jail rule. Pain for mere punishment is torture. This country has eliminated such form of punishment long ago, yet our courts still continue to turn a blind-eye, especially in cases involving prisoners. As this Court recognized in *Mitchell*, officials must be made to hesitate where his actions would violate a clearly established right of our citizens. *Mitchell*, 472 U.S. at 524.

Respectfully submitted,

Paul Hasty, Jr
Counsel of Record
Lloyd W. Raber
Hasty & Associates, LLC
7101 College Blvd, Suite 350
Overland Park, Kansas 66210
Telephone: (913) 317-8068
phasty@hastyassoc.com
Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Entered On June 30, 2010

CHRIS JOHNSON,	)	
Plaintiff,	)	
v.	)	
DENNIS ROBERTS, ET AL.	)	Case No. 09-2664-JTM
Defendants.	)	

MEMORANDUM AND ORDER

This is an action by former Miami County, Kansas jail inmate Chris Johnson, alleging that he was subjected to excessive force when he was tasered while in the jail. The matter is before the court on the defendant's Motion for Summary Judgment.

Findings of Fact

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital*, 854 F.2d 365, 367 (10th Cir. 1988). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985). The

moving party need not disprove plaintiffs claim; it need only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or brief. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 25.6 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a **genuine issue for trial**." *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)) (emphasis in Matsushita). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celdtex Corp. v. Catrett*, 477 U.S. 317 (1986).

On December 3, 2009, Chris Johnson ("Johnson") was an inmate and Dennis Roberts ("Roberts") and Wesley McClain ("McClain") were deputy jailers at Miami County Jail. When Roberts came to work that day, he noticed Johnson's towel hanging down from the bunk in his cell, secured by his properly

box. Jail rules allow a towel to be kept outside the property box for the purpose of drying, but Johnson had hung his towel with the short side hanging down over the side of the top bunk.

Prior to that date, Johnson had been warned that he could not hang his towel from his bunk, as it would obstruct the view of his cell from security cameras. Roberts told Johnson on December 3 that if his towel obstructed the view of the bunk, he would be written up for a disciplinary violation. Roberts reviewed the tapes for the security cameras and found the towel obstructed the view of the bottom bunk in Johnson's cell.

It is a violation of the prison rules to obstruct the surveillance cameras on any part of an inmates cell.[5] According to Miami County Sheriff Frank W. Kelly, this policy is necessary to prevent unnecessary damage to cells, reduce hiding places for contraband and weapons, to ensure inmates are not harming themselves, and to simplify cell searches and property inventories.

Roberts wrote a disciplinary report, and then went with McClain to Johnson's cell to give him the citation and. confiscate his property box. After Roberts handed the report to Johnson and asked him to sign it, Johnson wadded up the report, threw it in the toilet, and flushed. Roberts ordered Johnson to hand over his towel and property box.

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[5] Johnson contends the policy in the inmate handbook, which states that "obstructing the view of the camera on any inmate cell" is a prohibited act, means that he is in compliance with the policy as long as at least one camera remains unobstructed. However, the Court finds that the Sheriff reasonably interprets this policy to mean that if the view of any camera is obstructed, it is a violation of prison rules

Johnson handed his towel to Roberts through the cell door and McClain opened the cell door. Johnson threw the property box at Roberts and it struck Roberts on the foot. It is a violation of jail rules to refuse to comply with orders from jail staff.

Roberts pulled his taser and ordered Johnson to pick up his property box, Johnson refused, Roberts repeated the demand, and Johnson refused a second time. Roberts fired the taser at Johnson, who grabbed his mattress. The taser prongs stuck to the mattress. Roberts ordered Johnson to turn over the mattress to the deputies, but Johnson refused. Roberts tried to pull the mattress away from Johnson and a struggle ensued. Roberts tried to drive stun Johnson, but was unsuccessful because the taser did not fire.[6] Johnson also continued to use the mattress to protect himself from the taser. Eventually, Roberts physically took the mattress from Johnson, and McClain moved it to the side of the cell.

Having lost the mattress, Johnson picked up the blanket, which Roberts also order him to turn over. Johnson refused and another brief struggle ensued. Johnson used the blanket to shield himself while Roberts tried and failed to drive stun Johnson a second time because the taser did not fire.[7] Ultimately, Roberts was able to take the

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[6] "Drive stunning," also known as "dry stunning" is a technique in which a taser is put in direct contact with a target and activated. This is an alternative to firing the prongs from a distance.

[7] Johnson States in an affidavit that Roberts used the taser on him in excess of ten times. However, it is not clear from Johnson's statements that he was actually stunned from each "use" of the taser. The Court assumes for purposes of the

blanket and remove it and the mattress from the cell. The entire incident was over in a few minutes.[8]

Roberts had not come to Johnson's cell to take Johnson's mattress or blanket, and Johnson stresses that Roberts did not explain to him why he wanted the mattress and blanket. However, the Court finds the reason for requesting the mattress and blanket was obvious — Johnson was suing to aid in defiance of Roberts's orders.

Roberts and McClain left the cell, locked the door, and then McClain took the taser prongs out of the mattress. After Roberts left the cell, Johnson threatened to "get" Roberts and that he was going to file charges. Johnson also asked to speak to the Sheriff. A short time later, Roberts and McClain came back to the cell to clean some debris from Johnson's cell. Before bending down to clean the debris, Roberts waited until Johnson had moved what Roberts believed to be a safe distance away. Johnson waited at the back of the cell while Roberts finished cleaning the debris. After the incident, Johnson paced in his cell. Meanwhile, Roberts filed a taser usage report stating that Johnson was "resisting," that Johnson's resistance consisted of "refusing to release property;" and that Johnson "refused to comply with officers [sic] commands." Between one and two hours later, McClain noticed a note on Johnson's cell indicating

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present Motion for Summary Judgment that Johnson received multiple shocks during the brief encounter in the cell.

[8] A review of the video from the camera outside Johnson's cell indicates the entire incident, from the time Roberts appeared in the frame to the time the items were removed and the cell door closed, took place in about three minutes and four seconds.

Johnson needed medical attention. McClain did not see an urgent need for medical care. Johnson later asked McClain for medical care again. Roberts brought Johnson a medical complaint form. In the time after the incident, Johnson could stand and walk. Although Johnson claimed to be in pain, he appeared to Roberts and McClain to be unhurt.

Officers in the jail are to use the minimal level of force when it is necessary to ensure compliance with lawful orders and maintain order and security because it places the officer in less danger than a direct physical confrontation. Non-lethal force such as a taser is preferred over direct physical force because it allows the officer to stay in control and limits unforeseen injuries to inmates. According to Sheriff Kelly, after Johnson had refused the direct orders of Roberts, it was proper to attempt to ensure compliance by using the taser before forcing compliance through direct physical force. In Sheriff Kelly's opinion, the physical force used on Johnson was necessary to maintain order and security within the jail.

In his Response, Johnson stresses that Roberts was not assigned a taser and the taser is kept under lock and key. Jail policy states the taser may only be used with authorization from the jail supervisor. In their Reply, Roberts avers that jail officers have keys to the taser and are permitted to use it in the event they believe it necessary to protect any officer from any threats posed by inmates. Prior to going to Johnson's cell, Roberts took the taser from its lookbox and brought it to Johnson's cell in his belt, ready to use it against Johnson. The taser was brought along as a

precaution because Johnson had previously made unspecified threats toward Roberts.[9]

Roberts had declined to participate in a voluntary tasing, but he was aware both that taser use may cause serious injury or death and that tasers are designed to reduce the likelihood of such serious injury or death. Roberts also knew that tasers are designed to incapacitate subjects.

The Sheriff's Department has a general policy regarding the use of force which covers both inmates and non-inmates. The policy states that "deputies should use force with the highest tactical degree of restraint."[10] The policy also states that justification for the use of force is determined by the subject's resistence and whether the level of force "was necessary but not excessive when considering the type of resistence offered by the subject." Finally, the policy says that "good communication skills or a verbal direction can resolve many situations. Often the mere presence of a deputy and proper verbal direction will be sufficient to persuade most individuals to follow a deputy's direction."

The policy of less-lethal weapons states that "[u]se of the TASER X26 is permitted to protect the deputy or the public from what it reasonably

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[9] However, because this information first appears in the defendants' Reply, it does not form the basis for any of the Court's findings of fact as to the material issues in the case.

[10] The policy does not support Johnson's requested finding that physical force should only be used when verbal communication or other means cannot achieve the required action. It simply requires the highest degree of restraint, which does not foreclose the possibility physical force may be necessary.

believed to be a non-compliant and/or threatening subject." It also states that taser use is permitted "during training sessions or to support an outside agency requesting assistance; to assist the capture of any dangerous or wild animals that present the threat or potential threat to the deputy or the public safety."

In his Response to the Motion for Summary Judgment, Johnson presents several requested findings of fact[11] premised solely upon the video record of the incident. The Court has carefully reviewed the video recordings[12] and finds that in numerous instances the videotape does not support the requested finding. Accordingly, in these findings of fact, the Court omits any requested findings of fact based solely on speculation or on the video evidence where the video does not support the requested finding.

Noting that the defendants have included some additional evidentiary materials in their Reply, Johnson has also moved to either strike a portion of the defendant's Reply, or for leave to file a Surreply. Surreplies are disfavored, and in the present case wholly unnecessary, as the court premises its factual findings on the basis of the evidence submitted in the defendants' initial Memorandum and Johnson's subsequent Response.

Conclusions of Law

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[11] *See., e.g.*, Resp. at ¶¶ 7, 16, 20, 21, 22, 27, 27, 32, 37, 46, 55, 64, 66, 67, 68, 69, 72, 73, 75, 80, 81, 82-85, 86, 102-105.

[12] There are video recordings of the incident from two viewpoints: first, the fixed camera outside the cell, and a second camera built into the taser Roberts was using.

Defendants have moved for summary judgment claiming that they entitled to qualified immunity. Qualified immunity is an "entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsythe, 472 U.S. 511, 526 (1985). Government officials performing *discretionary functions are typically eligible for qualified immunity -Finless two conditions are met: (1) the official violated a statutory or constitutional right and (2) the right was clearly established at the time the alleged violation occurred. Lowly v. County ofRiley, 522 F .3 cl 1086 (10th Cir. 2008). Once defendants asserted a qualified immunity defense, the burden shifted to John son to show the relevant law was clearly established, and to come forward with sufficient facts to show Roberts violated the clearly established law. Foote v. Spiegel, 118 F.3d 1416 (10th Cir. 1997). Defendants argue that Johnson cannot establish that his constitutional rights were violated, and even if they were, the right against the use of the taser in this type of situation was not clearly established at the time of the incident.

The Eighth Amendment prohibits the unnecessary and wanton infliction of pain. Hudson v. McMillan, U.S. 1, 5 (1992). In order for Johnson to show a violation of his Eighth Amendment rights, he must show that Roberts used the laser not in. a good-faith-effort to maintain or restore discipline inside the jail, but rather to maliciously and sadistically cause harm to Johnson. See Hudson, 503 U.S. 1, 7. By hanging his towel in a way that obstructed the cameras, Johnson had broken a rule designed to advance prison order and security. Johnson had been warned previously

about obstructing the cameras, yet was uncooperative when Roberts and McClain came to confiscate the towel and the property box. When asked to hand over the property box, Johnson either dropped or threw the box to the floor. This was reasonably interpreted as an act of defiance, especially after Johnson refused Roberts' order to pick up the box. Only after Johnson refused to pick up the property box did Roberts attempt louse the laser on Johnson. Throughout the incident, Roberts gave Johnson several orders to surrender items (the property box, the towel, the mattress, and the blanket). When the taser failed to force compliance with Roberts's orders, Roberts resorted to physical force.

Johnson argues that force was not necessary to confiscate the property box because Roberts could have picked it up off the floor. However, this argument merely amounts to second-guessing the actions of a trained prison officer. The facts indicate Roberts acted out of a good faith effort to restore order and discipline in the jail. Roberts had just witnessed an act of defiance by Johnson (throwing the disciplinary report in the toilet). Thus, ordering Johnson to pick up the property box was a valid and reasonable order. Bending down to retrieve the property box from the floor could have put Roberts in a compromised position directly in front of a noncompliant inmate. In order to ensure the safety of everyone involved, Roberts reasonably ordered Johnson to pick up the box, which he, in turn, refused to do.

Johnson advances other arguments challenging the propriety of Roberts's actions. Johnson claims Roberts kicked the property box, and that doing so

was unnecessary, Roberts did not explain why he wanted to confiscate the mattress, and attempting to incapacitate Johnson was incompatible with the goal of forcing him to hand over the property box. All of these arguments again constitute the second-guessing of Roberts's actions. The question is not whether there was a different way Roberts could have acted, but whether Roberts's actions violated the Eighth Amendment. Roberts's actions were in direct response to Johnson's initial refusal to comply with Roberts's orders. The situation escalated from there, both with more defiance on the part of Johnson and more force on the part of Roberts. Johnson cannot show that Roberts's actions were a malicious or sadistic attempt to cause harm. Rather, his use of the taser began only after Johnson refused to comply with Roberts's order and ended as soon as Roberts had restored order by confiscating all of the items Johnson was using to defy the jail officials. Thus, Roberts's use of force was reasonable under the circumstances and was not a violation of the Eighth Amendment.

Assuming for a moment that Johnson's constitutional rights were violated, he would also have to show that those rights were clearly established at the time the violation occurred. In order for a constitutional right to be considered clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing would violate that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This does not mean that the very act of using a taser in this situation has been previously held unlawful, but rather in light of existing

precedent, the unlawfulness of the act was apparent. *Id.*

The use of a taser in this situation was not a clearly established violation of the Eighth Amendment at the time this incident occurred. Johnson devotes a considerable portion of his response to distinguishing the cases defendants presented to support their motion. Johnson distinguishes *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) and *Soto v. Dickey*, 744 F.2d 1260 (7th Cir. 1984) on the basis that they dealt with maximum security prisons rather than a jail, *Caldwell v. Woodford County*, 968 F.2d 595 (6th Cir. 1992) because it was regarding a prisoner being held in solitary confinement, and *Poindexter v. Woodson*, 510 F.2d 464 (10th Cir. 1975) because it analyzed force used to control a prison riot. He also advances his theory that none of the cases support the use of force as punishment, claiming that was Roberts' s motivation here. First, there is no evidence Roberts sought solely to punish Johnson, but rather the evidence indicates Roberts sought to restore order after Johnson had shown defiance toward the officers and refused to comply with their orders. Second, the attacks Johnson makes on the defendants' supporting cases are largely irrelevant to his goal of defeating defendants' summary judgment motion.

Although Johnson attempts to distinguish defendants' cited authorities, he does not present a single case clearly establishing that the use of a taser to ensure an inmate's compliance with orders violates the Eighth Amendment. Cases holding that qualified immunity does not protect taser use in a correctional environment have involved

markedly different facts from those present here. Thus, in *Lewis v. Downey*, 581 F.3 d 467 (7th Cir. 2009), the court held that qualified immunity would not apply where the defendants used a taser without warning on a docile, nonthreatening inmate lying prone in his blink. In reaching this conclusion, the court stressed that the taser and other non-lethal devices can play a legitimate role in enforcing orders in correctional facilities:

> Jails are dangerous places, and it is without rational dispute that security officials are justified in maintaining decorum and discipline among inmates to minimize risks to themselves and other prisoners. See *Bell v. Wolfish*, 441 U.S. 1520,] 546 [(1979)] ("[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees."); *Soto*, 744 F.2d at 1269 (according prison officials wide-ranging deference to adopt and execute policies "needed to preserve internal order and discipline"). We have previously discussed how important it is that prisoners follow orders:
>
> > Orders given must be obeyed. Inmates cannot be permitted to decide which orders they will obey, and when they will obey them.... Inmates are and must be required to obey orders. When an inmate refuse[s] to obey a proper order, he is attempting to assert his authority over a portion of the

> institution and its officials. Such refusal and denial of authority places the staff and other inmates in danger. *Soto*, 744 F.2d at 1267; see also *Colon v. Schneider*, 899 F.2d 660, 668-69 (7th Cir.1990).

581 F.3d at 476-77.

Without some clear precedent supporting his claim that the constitutional law on this issue is clearly established, summary judgment in favor of the defendants is appropriate. Johnson must do more than attempt to weaken defendants' case; he must come forward with controlling precedent of his own that clearly demonstrates Roberts should have known his actions violated the law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Johnson simply has not carried his burden.

IT IS ACCORDINGLY ORDERED this 29th day of June, 2010, that the defendants' Motion for Summary Judgment (Dkt. 35) is hereby granted. Plaintiff's Motion to Strike or for Leave (Dkt. 48) is hereby denied.

s/ J.Thomas Marten
Thomas Marten, Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Entered On December 22, 2010

CHRIS JOHNSON, Plaintiff,	)	
v.	)	No. 10-3170
DENNIS ROBERTS, THE BOARD OF COUNTY COMMISSIONERS OF MIAMI COUNTY, KANSAS, AND SHERIFF FRANK W. KELLY Defendants.	)	Case No. 09-2664-JTM

ORDER AND JUDGMENT*

Before **HARTZ, ANDERSON,** and **TYMKOVICH,**

Circuit Judges.

Chris Johnson appeals the grant of summary judgment to the Board of County Commissioners of Miami County, Miami County Sheriff Frank W. Kelly, and deputy jailer Dennis K. Roberts (collectively, Defendants) on his civil-

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

rights claims under 42 U.S.C. § 1983. The United States District Court for the District of Kansas ruled that Mr. Johnson, an inmate at the Miami County jail, had not been subjected to cruel and unusual punishment when deputy jailer Roberts tased him and used other physical force during an incident in Mr. Johnson's cell.

We have jurisdiction under 28 U.S.C. § 1291. The district court's opinion thoroughly discusses why the evidence presented at summary judgment could not support Mr. Johnson's claim. We affirm for essentially the same reasons stated in that opinion.

We add only a few words to clarify an issue and to correct two errors made in Mr. Johnson's briefs on appeal. First, Mr. Johnson argues on appeal that Defendants violated both his Eighth Amendment rights and his due-process rights, but he never indicates what difference, if any, there was between the two violations. We assume that he is simply noting that the Eighth Amendment applies to state conduct (as here) through the Due Process Clause of the Fourteenth Amendment. *See United States v. Georgia,* 546 U.S. 151, 157 (2006). If he means to argue something else, he has waived review of the issue by failing to develop the argument. *See Phillips v. Calhoun,* 956 F.2d 949, 954 (10th Cir. 1992) ("[I]ssues designated for review are lost if they are not actually argued in the party's brief.").

Second, Mr. Johnson repeatedly asserts in his briefs that it was not necessary for him to respond to Defendants' summary judgment motion with evidence, but that his allegations

alone can suffice. For this proposition, he relies *on Buchwald v. University of New Mexico School of Medicine,* 159 F.3d 487 (10th Cir. 1998), which states: "To survive summary judgment 'when a defendant raises the defense of qualified immunity, plaintiff must show the law was clearly established when the alleged violation occurred and must come forward with facts *or allegations* sufficient to show the official violated the clearly established law," *id.* at 496 (quoting *V-1 Oil Co. v. Means,* 94 F.3d 1420, 1422 (10th Cir. 1996) (brackets omitted; emphasis added).

But Mr. Johnson reads too much into the *Buchwald* language. That opinion never states that a plaintiff's allegations can substitute for evidence in response to a summary-judgment motion. *Buchwald* is merely addressing the first hurdle that a plaintiff must surmount in responding to a motion for summary judgment based on qualified immunity. If the plaintiff does not make the showing required by *Buchwald,* the claim must be dismissed. But if the plaintiff makes the showing, the usual rules of summary-judgment practice still apply; and if the defendant presents evidence that contradicts the plaintiff's allegations, the plaintiff must overcome a second hurdle—namely, responding with evidence, not just allegations. It was unnecessary for *Buchwald* to address the plaintiff's second potential hurdle, because the plaintiff had not shown that clearly established law had been violated on the facts and allegations she had presented. (In fact, it does not appear that any

relevant facts were disputed.). That the showing required by *Buchwald* is only enough to bring the usual summary-judgment procedures into play is alluded to in *V-1 Oil Co.*, the opinion quoted by *Buchwald*. In the sentence immediately after the language quoted by *Buchwald*, the *V-1 Oil Co.* opinion explains: "Defendant bears the normal summary judgment burden of showing no material facts that would defeat the qualified immunity defense remain in dispute." *V-1 Oil Co.*, 94 F.3d 1420, 1422-23; *see Powell v. Mikulecky*, 891 F.2d 1454, 1457 (10th Cir. 1989) ("Only after plaintiff has shown a violation of a clearly established right does the defendant assume the normal burden of a movant for summary judgment of establishing that no material facts remain in dispute that would defeat her or his claim of qualified immunity."). And, of course, when, as in the present case, 'a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2) (2009). Thus, Mr. Johnson could not rely on his mere allegations to defeat Defendants' summary-judgment motion.

Finally, Mr. Johnson's appellate briefs repeatedly complain that he was denied discovery that would have produced evidence helpful to his claim. To preserve that argument, however, he needed to respond to the summary-

judgment motion with an affidavit under Federal Rule of Civil Procedure 56(f) (relabeled as Rule 56(d), effective December 1, 2010) showing that he needed discovery to respond fully to the motion. He filed no such affidavit, so he cannot complain on appeal that he was denied discovery. *See Marquez v. Cable One, Inc.*, 463 F.3d 1118, 1120-21 (10th Cir. 2006).

We AFFIRM the district court's grant of Defendants' motion for summary judgment.

Entered for the Court
/s Harris L. Hartz
Harris L. Hartz
Circuit Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Entered On January 12, 2011

CHRIS JOHNSON, Plaintiff, v. DENNIS ROBERTS, THE BOARD OF COUNTY COMMISSIONERS OF MIAMI COUNTY, KANSAS, AND SHERIFF FRANK W. KELLY Defendants.	)	No. 10-3170 Case No. 09-2664-JTM

ORDER AND JUDGMENT

Before **HARTZ, ANDERSON,** and **TYMKOVICH,**

Circuit Judges.

This matter is before the court on Appellant's "Motion to File Petition for Panel Rehearing Out of Time" and "Petition for Panel Rehearing." The motion to file the petition for panel rehearing out of time is granted, and the Clerk shall file the petition as of the date received. The petition for panel rehearing is denied.

Entered for the Court,
/s Elisabeth A. Shumaker
Elisabeth A Shumaker, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Entered On May 4, 2010

CHRIS JOHNSON,	)	
Plaintiff,	)	
v.	)	
DENNIS ROBERTS, ET AL,	)	Case No. 09-2664-JTM
Defendants.	)	

MEMORANDUM AND ORDER

Before the Court is Defendants' Motion for Protective Order and/or Motion for a Stay of Discovery (Doc. 25); Plaintiff's Response (Doc. 28); and Defendants' Reply (Doc. 30.) After a careful review of the submissions of the parties, the Court is prepared to rule.

BACKGROUND

Plaintiff filed the present action alleging that on December 3, 2009, while he was incarcerated in the Miami County jail, he was attacked in his cell by a sheriff's deputy, defendant Dennis K. Roberts. (Doc. 1, at ¶¶ 8-10.) Plaintiff also alleges that another deputy, apparently Wesley McClain, stood by during the incident and watched it all happen, although that person is not a named defendant in this case. (Doc. 28 at 2, ¶ 3.) Defendants filed the present motion for a protective order and/or a stay of discovery regarding the two individual defendants (Roberts and Kelly) pending a ruling on their claim of qualified immunity. Defendants have now filed their Motion for Summary Judgment and supporting memorandum claiming qualified immunity. (Doc. 35,

36.) Plaintiff has obtained an extension of time to respond to that motion until May 13, 2010. (Doc. 41.) Plaintiff has also served an amended deposition notice seeking to take the depositions of Defendant Roberts and Wesley McClain on June 28, 2010. (Doc. 39.)

In responding to Defendants' motion, Plaintiff briefly outlines the facts of the case, states that the assault was obvious from a videotape taken of the attack, and "suggests that counsel meet with the Court and present the videotape to the Court and plaintiff believes that will make the decision an easy one." (Doc. 28 at 2, ¶ 5.) This response appears to address the viability of the qualified immunity defense rather than dealing with issues concerning the requested stay of discovery pending a decision concerning qualified immunity. In their reply, Defendants note that any motion for summary judgment will include the videotape of the incident (Doc. 30, at 1), and in fact, two videotapes have now been filed conventionally in support of the motion for summary judgment. (Doc. 38, 39.)

DISCUSSION

Judge Reid previously discussed the policy in this District for staying discovery in *Wolf v. United States,* acknowledging that the general policy is not to stay discovery even though dispositive motions are pending. 157 F.R.D. 494, 495 (D. Kan. 1994). Judge Reid also recognized, however, that there are exceptions to this general rule, holding:

> it is appropriate for a court to stay discovery until a pending dispositive motion is decided, especially where the case is likely

> to be finally concluded as a result of the ruling thereon; where the facts sought through uncompleted discovery would not affect the resolution of the motion; or where discovery on all issues of the broad complaint would be wasteful and burdensome.

Id. See also, Kutilek v. Gannon, 132 F.R.D. 296, 297-98 (D. Kan. 1990); *Howse v. Atkinson,* No. 04-2341-GTV-DJW, 2005 WL 994572, at *1 (D.Kan. April 27, 2005). In other words, lallthough a stay of discovery is generally disfavored in this district, the Court has broad discretion to stay an action while a Motion to Dismiss is pending pursuant to Fed. R. Civ. P. 26(c)." *Smith-Bey v. Reid,* No. 08- cv-01356-DME-KLM, 2008 WL 5216247, at *1 (D. Colo. Dec. 11, 2008) (citing *String Cheese Incident, LLC v. Stylus Shows, Inc.,* No. 02-cv-01934-LTB-PAC, 2006 WL 894955, at *2 (D. Colo. Mar.30, 2006)).

In this case, the Court must also take into account the special considerations afforded to cases in which the defense of qualified immunity is raised. The Supreme Court has long recognized that "public officers require [qualified immunity] protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald,* 457 U.S. 800, 806, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Such immunity is required to protect public officials and the public generally from the expenses of litigation, the diversion of official energy from public issues, the deterrence of qualified citizens from acceptance of public office, and the social cost that fear of being sued will have a chilling effect on officials from exercising

their official duties with ardor. *Id.* at 814.

Recognizing that the high costs of litigation may cause these harms to occur — even where a favorable verdict for the public official is rendered — the *Harlow* Court stated that, until the threshold question of immunity is resolved, discovery should not be allowed. *Id.* at 818; *see also Dahl v. City of Overland Park,* No. 02- 2036-JAR, 2002 WL 1634805, at *1 (D. Kan. July 8, 2002) ("Generally speaking, a defendant is entitled to have questions of immunity resolved before being required to engage in discovery and other pretrial proceedings"). Another court in this circuit has summarized these concerns about discovery while dispositive motions are pending:

> The Supreme Court has emphasized the broad protection absolute and qualified immunity afford, giving officials 'a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery." *Behrens v. Pelletier,* 516 U.S. 299, 308, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)); *see also Crawford-El v. Britton,* 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). As such, courts should resolve the purely legal question raised by an immunity defense at the earliest possible stage inlitigation. *Albright v. Rodriguez,* 51 F.3d 1531, 1534 (10th Cir.1995); *Medina v. Cram,* 252 F.3d 1124, 1127-28 (10th Cir.2001).
>
> ****
>
> There can be no doubt that Plaintiff has an

> interest in proceeding expeditiously, but this interest is offset by Defendants' burden. Here, Defendants have filed a Motion to Dismiss the claims against them, in part, on the grounds of qualified immunity. Courts have routinely held that discovery should be stayed while issues of immunity are being resolved. *See generally Siegert v. Gilley,* 500 U.S. 226, 231, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Weise v. Caspar,* 507 F.3d 1260, 1263-64 (10th Cir.2007); *Workman v. Jordan,* 958 F.2d 332, 336 (10th Cir.1992); *see also Behrens v. Pelletier,* 516 U.S. 299, 308 & 310, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) (noting that discovery can be particularly disruptive when a dispositive motion regarding immunity is pending). On balance, the Court finds the potential harm to Plaintiff of a stay is outweighed by the burden on Defendants resulting from conducting and responding to discovery while the Motion to Dismiss is pending.

Smith-Bey v. Reid, No. 08-cv-01356-DME-KLM, 2008 WL 5216247, at *1 (D. Colo. Dec.11, 2008).

In this case, Plaintiff has failed to identify any discovery which he contends is necessary for him to respond to the pending motion for summary judgment concerning qualified immunity. In fact, he claims that all the evidence the district court needs to assess qualified immunity is to view the videotapes which are exhibits to the motion for

summary judgment.[13] Based on the foregoing, the Court finds that Defendants should not be subjected to the burden and expense of discovery until the district court has resolved the pending motion for summary judgment. Defendants' Motion for Protective Order and/or Motion for a Stay of Discovery (Doc. 25) is, therefore, **GRANTED**.

IT IS FURTHER ORDERED that the noticed depositions of Roberts and McClain (Doc. 39) shall not proceed until the district court has ruled on the pending motion for summary judgment.

IT IS FURTHER ORDERED that the telephone status conference set for Thursday, May 6, 2010 at 3:00 p.m., is CANCELED. After the district court rules on Defendants' pending Motion for Summary Judgment (Doc. 35), the court will set another scheduling and/or status conference if necessary.

Dated at Wichita, Kansas, on this 4th day of May, 2010.

/s Donald W. Bostwick
Donald W. Bostwick
United States Magistrate Judge

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[13] Plaintiff has also impliedly acknowledged that the depositions of the two individuals who were present during the attack are not necessary in order for Plaintiff to respond to the motion for summary judgment since he has not noticed those depositions until June 28, 2010 -- long after his extended May 13, 2010 deadline for responding to the motion for summary judgment.